

# A PRIMER: WHAT STATE DEFENDERS MUST KNOW ABOUT FEDERAL LAW

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If you practice state criminal law  
you must have a basic  
understanding of federal law.

# PART 1

How you handle the state court case can impact your client in numerous ways in the federal system.

## Consequences of a failure to have some understanding of the federal consequences of state law convictions.

- It can result in the filing of federal charges and, in essence, handing your client over on a silver platter.
- It can have collateral consequences – for example result in a prohibition on your client owning a weapon or, if he is not a citizen, being deported.
- Any sentence your client receives in state court will affect your client's criminal history and, thus, his sentence if he is ever convicted of an offense in federal court.

**THEREFORE:**

**You must understand the federal law and sentencing guidelines.**

# Jurisdiction

- Article II, § 25 of Montana's precludes subsequent prosecutions in Montana for the same offense previously tried in any jurisdiction.
- However, a federal prosecution following a state prosecution for the same offense is not precluded by the Double Jeopardy Clause of the Fifth Amendment to the United States' Constitution.
  - Abbate v. United States, 359 U.S. 187 (1959)
  - United States v. Bernhardt, 831 F.2d 181 (9th Cir. 1987)

# When is an offense a “federal” crime?

- When there is a federal nexus –
  - i.e. interstate commerce (guns, computers, drugs etc.)
  - or if the offense occurs on federal property or on an Indian reservation.
- Since the 1970's, Congress has vastly increased the federal government's jurisdiction over crime
- What used to be considered street crime that was traditionally prosecuted in State Court is increasingly coming under the federal umbrella.

# Examples of areas where state and federal criminal law now overlap.

- Drug possession, distribution, and manufacture
- Firearms possession and use
- Child Pornography
- Fish and Game Violations
- Environmental Crimes
- Fraud
- Gambling Violations
- Securities Violations

- The federal system is based on people **ratting** each other out.
- The federal sentencing law is **designed to reinforce** this.
  - Many federal offenses have mandatory minimum penalties.
  - The judge has absolutely no discretion to sentence below these mandatory sentences – unless the government makes a motion based upon a defendant’s “substantial assistance.”
    - That is he or she has provided information that has led to another’s conviction.
  - Once a person has cooperated and the prosecution has made the motion then the judge has complete discretion in sentencing.



Any time you are dealing with a crime falling into any of these categories you must determine whether the feds have an interest in prosecuting your client – and you must take action to minimize the damage.



- As a result, any time you are dealing with a **DRUG CASE** – especially a methamphetamine case – there is a good chance that your client's name will come up in as part of a federal conspiracy case.
- If there is a **GUN** involved, it is almost a given.

# CHILD PORN



- The other offense that will almost always result in federal charges is anything remotely dealing with child pornography.
- This is the current crime de jure.
- Any time a computer is used, the feds have their jurisdictional “hook.” In some cases, all it takes is a camera or film that crossed state lines before being sold to your client.

## **Part 2**

**What to Do If You  
Think the Feds Are,  
or Might Become,  
Interested in Your  
Client.**

# WHAT CAN I DO?



- If federal agents are involved in the investigation, you can be sure that the feds are interested and that a federal prosecution is probably underway.
- If there is a question, especially in a drug, gun, or child pornography case, ask the state prosecutor if he or she has been in contact with the feds regarding this case.

# WHAT CAN I DO?



- Especially in a drug case, ask you client about what he or she knows about the extent of the enterprise.
- With a little luck, your client didn't spill his guts when he was arrested and you can negotiate the terms of cooperation and debriefing.
- If not you're not in as good of a position, but you can still salvage something.
- Sometimes, especially if you are the first one in, it is possible to get the feds to agree, in writing, not to prosecute your client federally.

# WHAT CAN I DO?

- If you cannot get an agreement not to prosecute, and there is danger of a federal prosecution, there are other agreements you must get from the feds before debriefing or acting as a confidential informant.
- Get a written letter from the federal prosecutor granting your client use immunity (transactional immunity is almost impossible to get) and providing, pursuant to U.S.S.G. 1B1.8 that any incriminating information provided by your client won't be used against your client in sentencing.



Neither law enforcement officers, (federal or state) or the state prosecutor can bind the federal prosecutor.







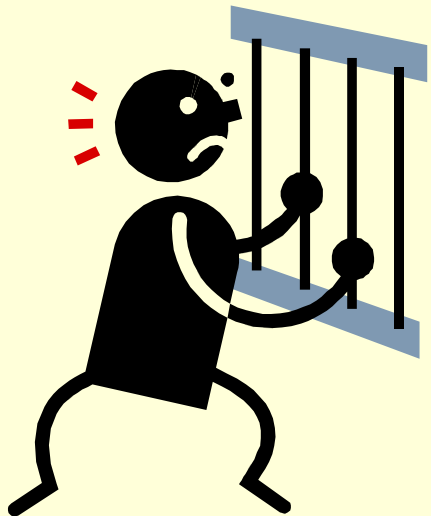
WHAT IF I CAN'T GET  
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  - **Note: Transactional immunity is almost impossible to get!**

The bottom line here is:  
**DON'T IGNORE THE POTENTIAL  
FEDERAL PROSECUTION.**

- If a case is going to go federal it is generally possible to have the state dismiss the charges as federal penalties are almost always far more onerous than state.
- If you don't have a deal in place and your client cooperates – or pleads guilty he is fair game for the feds.



# **PART 3:**

## **Potential Federal Consequences of a State Conviction**

There is a great discussion of this in MACDL list server this week. Brian Smith referred us to a very helpful website. Please contact Brian Smith @ [bsmith@mt.gov](mailto:bsmith@mt.gov) for further information.

- A state conviction can have numerous federal consequences for your client at least until his rights have been restored under the state constitution.
  - Article II, § 28 provides: “Full rights are restored by termination of state supervision for any offense against the state.”



Until your client's rights are restored his rights will be limited in at least the following respects:

- They will be precluded from possessing a firearm.
- Note that, in addition to felonies, a person can be precluded from possessing a firearm if he is convicted of “a misdemeanor crime of domestic violence.” 18 U.S.C. §922(g)(9).
- This can include a simple assault because the law does not require that the statute charge a domestic relationship as an element. It requires only that the misdemeanor have been committed against a person who was in one of the specified domestic relationships.
  - See, e.g. United States v. Belless, 338 F.3d 1963 (9th Cir. 2003).

# More consequences

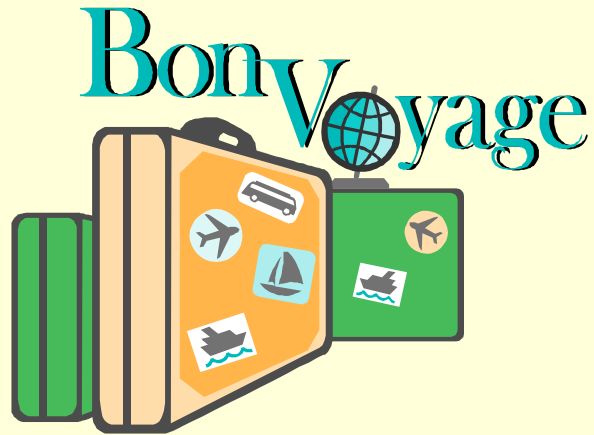
- To ensure that your client's right to possess a firearm will ultimately be restored, do your best to get a deferred imposition of sentence in any domestic violence case.
- If your client is serving a sentence in a penal institution he will not be able to vote.
- He will be precluded from serving on a federal jury.
- He may be precluded from receiving food stamps or student loans.

# Regardless of whether your client's rights are restored:



- (S)he will be precluded from enlisting in the military.
- (S)he may be precluded from obtaining or retaining some professional licenses or to engage in some professions such as banking and securities.
- If there is a lifetime requirement that (s)he register as a sex offender (s)he will be ineligible for federal assisted housing.





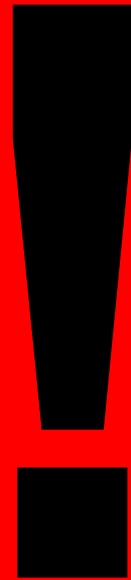
If your client is not a citizen a felony conviction may result in deportation.

## Part 4

**How What  
You Do in  
State Court  
Affects  
Future  
Federal  
Sentencing**



Regardless of any of the other concerns, if your client receives a sentence for a criminal offense in state court and is subsequently convicted of a federal offense the state sentence will affect his criminal history calculation and, thus, his federal sentence.



# Sentencing Guidelines

<http://www.publicdefender.mt.gov/training/sentencingguidelines.pdf>

# Sentencing Guidelines

## SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
Zone B	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone C	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162

# Sentencing Guidelines (Cont.)

Zone D						
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

# Criminal History Calculations

## U.S.S.G. § 4A1.1

- **Provides:**
  - Add **3 points** for each prior sentence of imprisonment exceeding one year and one month.
  - Add **2 points** for each prior sentence of imprisonment of at least sixty days not counted in (a).
  - Add **1 point** for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.
  - Add **2 points** if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- **Defines the term sentence of imprisonment as: “A sentence of incarceration” and refers to the maximum sentence imposed.**
- **If part of a sentence was suspended, “sentence of imprisonment” refers only to the portion that was not suspended.**
- **Juvenile sentences can count if they are recent enough or if the client was convicted as an adult. § 4A1.2 (2)**
- **Expunged sentences are not counted. § 4A1.2 (j).**
- **You need to make sure a timely motion is made to withdraw the guilty plea in if a deferred imposition of sentence was imposed and successfully completed.**